Lim Kek Ping & Anor v Thai Wah Construction & Development Sdn Bhd & Ors

HIGH COURT (SRI AMAN) — SUIT NO 22–1 OF 2006-I (SG)
RAVINTHRAN JC
29 JUNE 2012

Tort — Nuisance — Earthworks affecting natural flow of water — Earthworks by developer to raise level of defendants' adjoining lots caused water to stagnate on plaintiffs' land — Whether adverse effects of earthworks forseeable and developer clearly negligent — Whether developer could claim immunity from tortious claims because project approved by local authority — Whether any duty lay on plaintiffs to have provided for drainage owing to developer's works

The plaintiffs were co-owners of a piece of land ('Lot 700'). The first defendant was a housing development company while the other defendants were owners of lands adjoining Lot 700. The third and fourth defendants were also directors of the first defendant. The front portion of Lot 700, where the plaintiffs' house was situated, was on high ground fronting which was a road with a public drain ('the JKR drain') running alongside the road. The rear portion of Lot 700 was about six metres lower than the front portion and shared a common boundary with three lots of lands owned by the second, third and fourth defendants ('the defendants' lots') where development was being carried out by the first defendant. Prior to that development the defendants' lots were grassy undeveloped land and at a lower level to Lot 700. The plaintiffs had used the rear portion of Lot 700 for income-earning agricultural activities. They had fish ponds, a shed to store fish food and aqua-farming equipment and grew a variety of fruit trees and flowers and reared poultry. The plaintiffs had constructed a perimeter drain around their house which carried surface water from the front portion of the house to the JKR drain. The surface water from the rear portion of Lot 700 naturally flowed out through the defendants' lots. Due to earthworks carried out by the first defendant on the defendants' lots to raise their level, serious drainage problems was caused to Lot 700. Large volumes of water, mud and waste flowed onto Lot 700 after every heavy downpour severely damaging the plaintiffs' agricultural activities. The plaintiffs also claimed the first defendant's workers had entered upon Lot 700 and piled bakau wood into the land and built concrete slabs for the construction of a retaining wall for the benefit of the defendants' lots. When the plaintiffs complained about the encroachment, the first defendant abandoned whatever work they had done and began building a new retaining wall afresh on one of the defendants' lots. The plaintiffs brought the instant action against the defendants for trespass and nuisance. The defendants counterclaimed for special damages for additional

works they had to undertake and for loss of profits from delays to their construction schedule contending it was all due to water from the rear portion of Lot 700 flowing onto the defendants' lots. The defendants claimed it was the plaintiffs' duty to have provided for proper drainage of water from Lot 700 and that they had failed in that duty.

Held, allowing the claim and dismissing the counterclaim with costs:

(1) The first defendant had committed trespass and nuisance to the plaintiffs by piling bakau wood and constructing concrete slabs on the plaintiffs' land (see para 38).

(2) The first defendant was also liable in nuisance for the water stagnancy problem of the plaintiffs. The earthworks and construction of a retaining wall on the defendants' lots had prevented the natural flow of water from the rear portion of the plaintiffs' land. The first defendant should have provided adequate drainage from the outset. As a developer with surveyors and engineers at its disposal, it should have foreseen that the surface run off and spring water would be trapped on the rear portion of Lot 700 due to the increase in height of Lot 99 (one of the defendants' lots)(see paras 44, 51 & 54).

(3) The first defendant was not immune from tortious claims merely because its project had been approved by the relevant local authority. In any event, to avail of the defence of statutory authority, the first defendant had to successfully demonstrate it was not negligent. In the instant case, it was foreseeable that raising the level of the defendants' lots and erecting a retaining wall would pen back water from Lot 700 which was formerly higher than the defendants' lots (see para 56).

(4) There was no duty on the plaintiffs' part to provide for drainage as water from Lot 700 had naturally flowed to the defendants' lots prior to the execution of the first defendant's development project. All other arguments on which the counterclaim was hinged, including the argument that the plaintiffs should have constructed a retaining wall, was related to this alleged duty to provide drainage (see para 68).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan pemilik bersama sebidang tanah ('Lot 700'). Defendan pertama adalah sebuah syarikat pembangunan perumahan manakala defendan-defendan yang lain ialah pemilik tanah bersebelahan Lot 700. Defendan ketiga dan keempat juga merupakan pengarah-pengarah defendan pertama. Bahagian hadapan Lot 700, di mana terletaknya rumah plaintif-plaintif, berada atas tanah tinggi berhadapan dengan jalan dengan longkang awam ('longkang JKR') sepanjang tepi jalan tersebut. Bahagian belakang Lot 700 adalah kira-kira enam meter lebih rendah daripada bahagian depan dan berkongsi sempadan yang sama dengan tiga lot tanah yang dimiliki

oleh defendan kedua, ketiga dan keempat ('lot-lot defendan-defendan') di mana pembangunan sedang dijalankan oleh defendan pertama. Sebelum pembangunan tersebut, lot-lot defendan-defendan merupakan tanah berumput yang belum dibangunkan dan berada pada paras yang lebih rendah daripada Lot 700. Plaintif-plaintif telah menggunakan bahagian belakang Lot 700 untuk menjana pendapatan aktiviti pertanian. Mereka mempunyai kolam-kolam ikan, bangsal untuk menyimpan makanan ikan dan peralatan pertanian-aqua dan menanam pelbagai pokok buah-buahan dan bunga-bungaan serta menternak ayam. Plaintif-plaintif telah membina longkang perimeter di sekitar rumah mereka yang menyebabkan takungan air daripada bahagian depan rumah ke longkang JKR. Takungan air daripada bahagian belakang Lot 700 dengan semulajadinya mengalir keluar melalui lot-lot defendan-defendan. Oleh kerana kerja-kerja tanah yang dijalankan oleh defendan pertama di lot-lot defendan-defendan untuk meningkatkan paras mereka, masalah sistem perparitan yang serius telah diakibatkan kepada Lot 700. Jumlah air, lumpur dan sisa yang banyak mengalir ke Lot 700 selepas setiap hujan lebat telah merosakkan aktiviti pertanian plaintif-plaintif dengan teruk. Plaintif-plaintif juga mendakwa pekerja-pekerja defendan pertama telah masuk ke Lot 700 dan menimbunkan kayu bakau ke atas tanah mereka dan membina papak konkrit untuk pembinaan dinding penahan bagi manfaat lot-lot defendan-defendan. Apabila plaintif-plaintif mengadu tentang pencerobohan, defendan pertama meninggalkan semua kerja yang telah mereka lakukan dan mula membina dinding penahan baru atas lot-lot defendan-defendan. Plaintif-plaintif membawa tindakan ini terhadap defendan-defendan atas pencerobohan dan kacau ganggu. Defendan menuntut balas bagi ganti rugi khas untuk kerja-kerja tambahan yang mereka jalankan dan untuk kehilangan keuntungan akibat kelewatan jadual pembinaan mereka, menghujahkan bahawa ia adalah semua kerana air dari bahagian belakang Lot 700 yang mengalir ke lot-lot defendan-defendan. Defendan-defendan mendakwa bahawa ia adalah tugas plaintif-plaintif untuk menyediakan saliran air yang sepatutnya dari Lot 700 dan bahawa mereka telah gagal dalam tugas tersebut.

Diputuskan, membenarkan tuntutan dan menolak tuntutan balas dengan kos:

(1) Defendan pertama telah melakukan pencerobohan dan kacau ganggu kepada plaintif dengan menimbunkan kayu bakau dan membina papak konkrit di atas tanah plaintif (lihat perenggan 38).

(2) Defendan pertama juga bertanggungan dalam kacau-ganggu bagi masalah air berterusan yang dihadapi plaintif-plaintif. Kerja-kerja tanah dan pembinaan dinding penahan di lot-lot defendan-defendan telah menghalang aliran semulajadi air dari bahagian belakang tanah plaintif-plaintif. Defendan pertama sepatutnya menyediakan saliran yang mencukupi dari awal lagi. Sebagai pemaju dengan juruukur dan

jurutera atas arahannya, ia sepatutnya diramalkan bahawa saliran takungan dan mata air akan tertakung di bahagian belakang Lot 700 akibat peningkatan paras Lot 99 (salah satu daripada lot-lot defendan-defendan) (lihat perenggan 44, 51 & 54).

(3) Defendan pertama juga tidak terkecuali daripada tuntutan tort semata-mata kerana projek telah diluluskan oleh pihak berkuasa tempatan. Dalam apa jua keadaan, untuk mendapatkan pembelaan pihak berkuasa statutori, defendan pertama telah berjaya menunjukkan bahawa ia tidak cuai. Dalam kes ini, ia boleh dijangkakan bahawa dengan meningkatkan paras lot-lot defendan-defendan dan mendirikan tembok penahan akan menahan air dari Lot 700 yang dahulunya lebih tinggi daripada lot-lot defendan-defendan (lihat perenggan 56).

(4) Tiada tugas di pihak plaintif-plaintif untuk menyediakan saliran kerana air dari Lot 700 secara semulajadinya mengalir ke lot-lot defendan-defendan sebelum pelaksanaan projek pembangunan defendan pertama. Kesemua hujahan lain yang didasarkan oleh tuntutan balas, termasuk hujah bahawa plaintif sepatutnya membina dinding penahan, berkait rapat dengan dakwaan tugas untuk menyediakan saliran ini (lihat perenggan 68).]

Notes

For a case on earthworks affecting natural flow of water, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) para 1894.

Cases referred to

Allen v Gulf Oil Refining Ltd [1981] 1 All ER 353, HL (refd)
Bailey v Vile & Anor [1930] NZLR 829 (refd)
Gartner v Kidman (1962) 108 CLR 12, HC (refd)
Gibbons v Lenfestey (1915) 84 LJ PC 158, PC (refd)
Gillingham Borough Council v Medway (Chatham) Dock Co Ltd & Ors [1992] 3 All ER 923, QBD (refd)
J A Pye (Oxford) Ltd and another v Graham and another [2002] 3 All ER 865, HL (refd)
John Young & Co v Bankier Distillery Co [1893] AC 691, HL (refd)
London Borough of Hounslow v Minchinton (1997) 74 P & CR 221; [1997] NPC 44 (refd)
Medway Investments Pte Ltd v Trustees of the Estate of Cheong Eak Chong [1997] 3 SLR 40, CA (folld)
Ng Yee Fong & Anor v E W Talalla [1986] 1 MLJ 25, SC (refd)
Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd [1984] 1 MLJ 286; [1984] 1 CLJ 291, FC (refd)
Sheik Hussain Sahib v Pachipulusu Subbayya 1925 ILR 49 Mad 44, HC (refd)
Yayasan Pelajaran Bahagian Pertama Sarawak v Lim Teck Hai & 8 Ors [2008] MLJU 761; [2008] 1 LNS 637, HC (refd)

Legislation referred to

Sarawak Land Code (Cap 81) ss 32(1)(b), 35, 39A, 131, 227
Gulf Oil Refinery Act 1965 [UK]

Yong Sie Mee (Loke, King, Goh & Partners Advocates) for the plaintiffs.
Mekanda Singh Sandhu (Tay Choon Howe, Satinder Singh Sandhu and Kalveet Singh Sandhu with him) (Sandhu & Co Advocates) for the defendants.

Ravinthran JC:

INTRODUCTION

[1] This is a suit founded on trespass and nuisance by the husband and wife co-owners of a parcel of land against their neighbours who are a housing development company and three owners of several parcels of adjoining land. The plaintiffs have prayed for injunctive relief as well as damages. The defendants have disputed the claims and have filed a counterclaim against the plaintiffs.

THE PLAINTIFFS' CASE

[2] The plaintiffs are owners and occupiers of Lot 700 of Undup Land District. The area comes under the jurisdiction of Sri Aman District Council (Majlis Daerah Sri Aman or MDSA). The plaintiffs bought Lot 700 in 1997. It is a rectangular parcel of land. The front portion of the land is high ground with a spot height of 17 metres (or in other words with an elevation of 17 metres above sea level). This area comprises one third of the land. It lies next to the road known as Long Round Road. A JKR public drain runs along this road. The plaintiffs constructed a double storey brick house on this part of the land in 1999. The rear portion of the land comprises two thirds of the land. It is characterised by a sharp drop in spot height. It is lower in height than the Long Round Road. The lowest spot height recorded on the rear portion is 10.9 metres. This spot height is lower than the invert level (base or floor level) of the main JKR drain along Long Round Road. The rear portion of the plaintiffs' land shares a common boundary with Lots 99, 190 and 698 of Undup Land District. The second, third and fourth defendants are the respective owners of these lots. The first defendant is the developer of housing and commercial estate project known as Taman Desa Indah. The third and fourth defendants are also the directors of the first defendant company. The project comprises the above lots as well as the adjoining Lots 341, 352, 690, 770 and 77.

[3] The complaint of the plaintiffs is as follows. Prior to the development of the Taman Desa Indah project, the plaintiffs had used the rear portion of Lot

700 for agricultural activities. PW1 (the first plaintiff) told the court that he had constructed three fish ponds. He had also constructed a zinc shed to store fish food and aqua farming equipment. PW1 and his wife, PW2, had also planted fruits like pitaya plants, flower plants, bonsai, orchids, banana plants, longan trees, durian trees and dabai trees on the land. They also reared some poultry. PW1 told the court that he had constructed a perimeter drain around his house. The water from the front portion of the house flowed to the JKR drain through the perimeter drain. PW1 said as follows:

> The bulk of the surface water from the front portion of my land is discharged to the JKR main drain near the Long Round road. As for the rain water collected from the roof of my house, the bulk of it flow to the perimeter drain around my house and then channeled to the pipes that discharges the water to the JKR main drain along the Long Round road.

[4] As for the water from the rear portion, PW1 said as follows:

> The surface water from the rear portion of my land would naturally flow out through Lots 99, 698 and 190. The reason is that the original ground level of Lots 99, 190 and part of Lot 698 is generally lower than my land.

[5] Sometime in the middle of 2004, PW1 noticed that the first defendant commenced development of the Taman Desa Indah project by carrying out earth leveling and earth filling works on Lots 99, 190 and 698 which adjoin the rear portion of his land. The earth filling works raised the level of these lots and directly affected the rear portion of Lot 700. He said that prior to the commencement of the Taman Desa Indah project, the surface water from the rear portion of his land would naturally flow out through Lots 99, 698 and 190. This is because the original ground level of Lots 99, 190 and part of Lot 698 was generally lower than his land. At that time, Lots 99, 190 and 698 was grassy undeveloped land. The increase in the height of Lots 99, 190 and 698 caused a serious drainage problem for the plaintiffs. Each time after a heavy downpour or during the monsoon season, large volumes of water, mud and waste would enter his land, especially along boundary pegs 354 and 357. These pegs are on the south eastern boundary of the rear portion of the plaintiffs' land. As a result, the plaintiffs sustained heavy damage. His fish ponds were damaged and became unusable. His fruit trees were also damaged. He lost his normal income from agricultural activities on the rear portion of his land.

[6] Apart from the flow of water, mud and waste into his land from Lots 99, 190 and 698, which is the basis of the nuisance cause of action, the plaintiffs have also couched an action in trespass and nuisance because the first defendant had left bakau and concrete slabs on his land. PW1 said that in the middle of June 2006, the first defendant's workers entered his land and started piling bakau wood. PW1 immediately complained to one Yong Ah Mui, a surveyor

from the Lands and Surveys Department in Betong. However, Yong Ah Mui also worked for the first defendant. Yong Ah Mui told PW1 that the said part of the land belonged to the first defendant. The first defendant then continued to build the concrete slabs on the ground on which the bakau wood had been driven in. PW1 then lodged a police report on 12 July 2006 about the encroachment. He also complained to the Lands and Surveys Department of Sri Aman. Finally, he engaged a professional surveyor, Collin Cheong of Survey Solutions. Mr Cheong confirmed that the concrete slabs and bakau wood were on the plaintiffs' land. They had been placed about 1.1 metres from the common boundary. The retaining wall was meant to be constructed on the concrete slabs. However, after PW1 complained, the first defendant left the concrete slabs on the plaintiffs' side of the land and started to build a retaining wall on the defendants' side of Lot 99. The second complaint is that the retaining wall protrudes into the plaintiffs' land. After the suit was instituted on 6 February 2006, the plaintiffs successfully obtained the following interlocutory injunctions from Justice Clement Skinner that required the defendants to:

(a) dig up, remove and clear the hardwood and/or bakau piles driven into the plaintiffs' land and fill up and level the plaintiffs' land to its original state;

(b) drain and/or pump out the water, waste mud and/or slush which flowed from their housing project onto the plaintiffs' land;

(c) to prevent further discharge of water, waste and refuse from the housing project onto the plaintiffs' land; and

(d) the first defendant and/or their successors are to do all things necessary to provide a permanent water outlet for the purpose of discharging water from the plaintiffs' land to the housing project.

[7] The defendants appealed this decision. At the Court of Appeal, the parties entered the following consent order on 2 April 2007:

(a) the appellant (defendant) obtain the permission of the co-registered proprietors of Lot 703, Block 4, Undup Land District within 30 days to backfill their land with suitable soil to such level to enable the surface water to discharge through the permanent drains of Taman Desa Indah project;

(b) that the first appellant (first defendant) backfill Lot 700 Block 4, Undup Land District with suitable soil to such level to enable the surface water to discharge through the permanent drains of Taman Desa Indah project;

(c) that a sum of RM50,000 be made as ex-gratia payment by the appellant to the respondents (plaintiffs) without admission of liability; and

(d) the first appellant is to commence the earth filling works

abovementioned and make the ex-gratia payment abovementioned within 21 days of obtaining the approval as abovementioned.

[8] Unfortunately, the first defendant failed to obtain the permission of the owner of Lot 703, who is the neighbour of the plaintiffs, to earth fill his land. As a result, the consent judgment was set aside. The appeal against the injunctive orders made by Justice Clement Skinner were dismissed.

[9] Apart from PW1, eight other witnesses testified. Their evidence can be summarised as follows.

[10] The second witness was Mr Sulaiman bin Budin (PW2), a land and survey planning officer from Sri Aman. He produced the approved engineering plan for the Taman Desa Indah project. When referred to the plan, he said that the invert level of the Taman Desa Indah drain at the point of peg 357 was 12.11 metres.

[11] The third witness was Mr Collin Cheong Yeong Guang (PW3), a licensed land surveyor from survey solutions. His firm did a boundary survey of Lot 700. The assistant who actually carried out the survey was Michael Chin Gian Onn (PW4). His finding was that the concrete slab measuring about 26.5 m by 1.1 m was inside Lot 700. He also said that the concrete slabs extended another 25 metres in the southerly direction in the waterlogged area. PW4 confirmed these findings. In respect of the retaining wall, PW3 said that two sections of the wall had encroached 29 millimetres into Lot 700. However, in his report, PW4 stated that 70 millimetres is the allowable error. PW4 also calculated the volume of earth necessary to fill up the rear portion of the plaintiffs' land. He said that the volume to fill up Lot 700 is 4,495.4 cubic metres. His calculations were admitted into evidence.

[12] The fifth witness was Mr. Benjamin Lim Seng Kong (PW5), the son of the plaintiffs. He was alleged to have tampered with the water pumping machine which was installed to pump water out of the waterlogged rear portion of Lot 700. The first defendant videotaped him touching the machine. The defendants also lodged a police report. PW5 stated in court that he was curious whether the machine could be made to run faster. He denied intending to cause any damage to the machine. He also denied attempting to interfere with the first defendant's draining works.

[13] The sixth witness was Mr Hisyammudin bin Suai (PW6). At the material time, he worked as Lands and Surveys Department planning officer in Sri Aman. He said that a housing developer must submit the engineering plan together with the topographical survey plan and engineering design calculation to the Land and Survey Department. He said that PW1 came to his office to

complain about ponding at the rear portion of his land. He told PW1 that water from his land should flow to the Taman Desa Indah drain.

[14] The seventh witness was Mr Wong Kiing Chai (PW7), a professional engineer. He was instructed by PW1 to conduct two studies on Lot 700, ie (a) hydrological study on the said Lot 700 and surrounding areas, and (b) feasibility study for removal of bakau piles and existing concrete slabs in Lot 700. PW7 said that the concrete slabs can be removed without using heavy machinery. The defendants had commissioned a report (G & L associates report) which stated that heavy machinery could cause damage to the land. PW7 said that a small air compressor breaker could be used to break down the concrete slab and remove the debris. In respect of the hydrological study, he reached the same conclusion as the G & L associates report, ie filling up the rear portion of Lot 700 up to 12.8 m would allow discharge of water from rear portion of Lot 700 to the drainage system of Taman Desa Indah.

[15] The eighth witness was Mrs Jane Liaw Ting Jiuan (PW8), the second plaintiff and the wife of PW1. She said that sometime in June 2004, her husband went over to the construction site to complain to the third defendant about the waste water, mud and silt that had flowed to Lot 700. When he returned about 20 minutes later, he was angry because the third defendant had scolded him and told him that he is an experienced developer. PW8 also gave similar evidence as her husband about the damage caused by the ponding at the rear portion of Lot 700.

[16] The ninth witness was Jap Kiam Chian (PW9). He is a contractor doing earth works, roads and construction. PW1 had requested several quotations from him to repair the damage to his fish ponds, fencing and zinc shed. PW9 said that the cost of constructing three fish ponds is RM14,400, the cost of a new zinc shed is RM850 and the cost to replace the damaged chain link fence is RM8,001. PW9 also gave evidence in respect of the cost of earth filling the rear portion of Lot 700. PW9 had visited Lot 700. However, he did not personally calculate the volume of earth required. He relied on the calculation of PW4, the surveyor from survey solutions. PW4 had calculated that 4,495.4 cubic metres of earth would be required to increase the level of the rear portion of Lot 700. Based on this calculation, he said the cost of earth filling the rear portion of Lot 700 is RM85,412.60 at RM19 per cubic metre.

THE DEFENDANTS' CASE

[17] The defendants' pleaded case can be summarised as follows. The defendants denied that the earth leveling and filling works at the Tainan Desa Indah project caused obstruction of the natural flow of water from Lot 700 to their land. The defendants averred that the plaintiffs had built a substantially

high cost double storey detached dwelling cum workshop on the highest part of their land although it is conditioned for agricultural use only. They did not obtain approval from the relevant authority. Furthermore, it is averred that the plaintiffs failed to provide a drainage system at the rear portion of their land to discharge water and waste. The defendants also denied that the water and waste flowed from their land to the rear portion of Lot 700. The defendants averred that in carrying out the Taman Desa Indah project, they had complied with the approved engineering plan. In their counterclaim, the defendants averred that as water flowed from the rear portion of Lot 700 into their land, they were forced to amend the original engineering plan and construct a retaining wall at the boundary of Lots 700, 99 and 698. The defendants were also forced to maintain a temporary culvert to drain out water that came into their land. For all these expenses, the defendants are claiming special damages of RM1,106,454 and general damages caused by the alleged delay to the housing project.

SUMMARY OF EVIDENCE OF THE DEFENDANTS

[18] The defendants also called nine witnesses. The first witness was Tay Ah Tee (DW1), the managing director of the first defendant. He categorically denied the plaintiffs' allegations that the defendants' construction activities and their failure to maintain the temporary culvert at boundary peg 357 caused a nuisance. Instead he squarely blamed the plaintiffs in the following passage of his witness statement which neatly summed up the entire defence:

> I strongly dispute the allegations. The plaintiffs are blaming the defendants for their own omissions or failures. The real cause for the alleged nuisance was the plaintiffs' failure to provide a drainage system within the boundary of their own land for the discharge of water from the rear portion of their land. According to the plaintiffs, they constructed three fish ponds and a fish shed in the rear portion of their land. But, they did not provide for the drainage needs of the development of the land, for example, by constructing a perimeter drain to discharge the water and waste from these fish ponds and other parts of the rear portion of their land to the common JKR drain at Long Round Road.

[19] DW1 said that he was concerned with the consequences to both the plaintiffs and the first defendant of replacing the temporary drain with a permanent drain which had to be constructed in accordance with the approved engineering plan at a higher platform level than the rear portion of Lot 700. The solution that he suggested was to increase the rear portion of Lot 700 to the same level as Lots 99 and 698 so that its water could flow through to the Taman Desa Indah drainage system. However, PW1 rejected the proposal. DW1 also complained to the relevant authorities about the construction of a double storey house on the plaintiffs' land without proper approval as their land was only conditioned for agricultural use. In respect of the trespass claim based on

the construction of the concrete slabs, he also blamed the plaintiffs. The plaintiffs had constructed the chain link fence inside their boundary. Two boundary pegs were placed at the chain link fence. Therefore, he ordered the piling works and construction of concrete slabs to provide foundation for the retaining wall to be done one foot away from the chain link fence. Only later he realized that the boundary of Lot 99 was further away from the chain link fence of Lot 700. However he said that the extra portion of land is 'no-man's land'. He said that the counterclaim is for:

(a) the construction and maintenance of drains and culverts;

(b) the construction of an alternative access road to site;

(c) the additional costs for the construction of six shophouses by reason of having to maintain the alternative access road on the subdivided lots for the proposed shophouses;

(d) the loss occasioned by the delay in the construction;

(e) additional costs for the construction of retaining wall;

(f) increase in the costs of two permanent drains;

(g) increase in the costs of construction of permanent bitumen access road; and

(h) increase in the construction of 'hard shoulder'.

[20] The special damages sought for the above alleged expenses and loss is RM1,106,454.20. In addition, the defendants are also claiming damages for the alleged wrongful grant of injunctions. The indemnity claim is in the sum of RM376,500 (as at February 2010 and continuing) for draining the water and discharge from the plaintiffs' land.

[21] The second witness was Mr Kong Yew Tack (DW2), a director of the first defendant. He also said that the concrete slabs and bakau piling were done on no-man's land. He also said that the plaintiffs have not obtained approval for the construction of the double storey brick house through an application for variation of title condition (AVTC). He disputed the plaintiffs' estimate of the construction costs of the fish ponds as well as the repair of the fence and the costs of earth filling of the rear portion of the plaintiffs' land. DW2's estimate of the costs of the earth filling was RM30,000.

[22] The third witness was Mr Lim Tek Huat @ Lim Teck Huat (DW3), a professional engineer practicing under the name and style of PE Konsultant. He prepared the engineering plan for the Taman Desa Indah project. When he prepared the engineering plan, he referred to the invert level of the main JKR drain because the invert levels of the concrete drains of Taman Desa Indah

cannot be lower than the invert level of the JKR common drain at the point of the discharge outlets. He also said that the proposed platform levels of Taman Desa Indah are determined by the road level of Long Round Road. He said that his proposed engineering plan with hydraulic calculations that took into account surface water run-off was approved by the local authority.

[23] The fourth witness was Mr Tay Sau Kang (DW4), a licensed land surveyor and managing partner of United Survey Consultants. He was engaged by the defendants. He prepared a report to verify the position of the retaining wall along pegs 354 and 357 on Lot 99. He was not sure if 'no-man's land' existed between Lot 99 and Lot 700. DW1 and DW2 had said that there was 'no-man's land' between the two parcels. DW4, however, did not rule it out. He said as follows:

> I cannot confirm whether that stretch is indeed 'no-man's land' or not but I must say that land surveying is not an exact science and that 'no-man's land' does exist.
>
> 'No-man's land' should more properly be known as 'hiatus' and it could be caused by poor instrumentation, rough terrains etc.
>
> Therefore, and in view of what I stated earlier, it is crucial for a landowner to maintain the boundary marks and partitions of his land and to assert his boundary if he believes or suspects that encroachment has taken place.

[24] He disagreed with the report of Collin Cheong that there was natural channel for water to drain or flow from the rear portion of Lot 700. Collin Cheong had said in his report that the contour of the back portion of Lot 700 runs in a concave shape from a higher level to a lower level and that it is a dish like shape which indicates a natural water flow down that way. However, during cross-examination, DW4 admitted that he did not enter Lot 700.

[25] The fifth witness was Mr Yu Lee Hwa (DW5), a foreman in the employ of the first defendant. He was tasked by the first defendant with draining water out of the rear portion of Lot 700. He testified that PW1 and his son (PW5) had on occasions interfered with the draining of the water by switching off the pump. He tendered the photographs of the incident. He also tendered the various photographs he took as a record of the draining activities.

[26] The sixth witness was Mr Goh Tze Siang (DW6), a registered professional engineer practising under the name and style of GL Associates. He visited the site of Taman Desa Indah and the surrounding area at the invitation of the first defendant to do a hydrological study and suggest reasonable solutions to the water stagnancy problem. He also did a feasibility study on the removal of the bakau piles and the concrete slabs inside Lot 700. He said that the proprietors of Lot 700 should have constructed proper perimeter drains in accordance with an approved engineering plan to discharge water into the

common JKR drain. He said that the lowest point on Lot 700 along the concrete drain is at peg 357. The spot height there is between 10.88–10.94 metres whereas the invert level of the concrete drain at peg 357 is 12.11 metres. Thus water cannot flow into the concrete drain. The invert level of the concrete drain cannot be lowered because the JKR common or main drain is at 11.23 metres. He said that the solution is to earth-fill the rear portion of Lot 700 to a spot height of 12.8 metres and create a drainage system to connect to the Taman Desa Indah concrete drain. In respect of the bakau piles and the concrete slabs in Lot 700, he advised against their removal. He concluded that the undertaking is fraught with risks to the retaining wall:

> My conclusion is that both methods involve a very high risk of the retaining wall collapsing during and/or after the proposed removal work, bearing in mind that there are some 60 piles driven between 16 to 20 feet into the soil. Both methods are neither practical nor safe to be carried out. I have identified 3 likely failure modes:
>
> (1) Structural failure (ie cracking) of the retaining wall due to enormous vibration and weight/loading caused during the proposed removal work;
>
> (2) the retaining wall may overturn due to greater height difference and weight/loading;
>
> (3) the retaining wall may slide off from its original position due to the excavation of concrete base and bakau piles.
>
> The third failure mode is the most likely to occur if the removal work is carried out.

[27] DW6 further said that the collapse of the retaining wall will trigger structural failure of the surrounding buildings and infrastructures. He said that if the plaintiffs intend to build a car porch near the boundary of Lot 99 in the future, cantilever ground beams could be used to support the car porch columns. PW7 (the engineer engaged by the plaintiffs) had said that a car porch could not be built because of the concrete slabs.

[28] The seventh witness for the defendants was Mr Majuan bin Jeraie (DW7), the superintendent of the Lands and Surveys Department at Kuching. At the material time he was attached to the Lands and Surveys Department at Sri Aman. He identified the letter that he wrote to the plaintiffs in 2008 advising them to apply for AVTC and submit a building plan. He did not share the view that the plaintiffs had not breached the condition of title by building a double storey house. He said that the land and the dwelling house must still be predominantly used for agricultural purposes 'otherwise one can build a castle or mansion on a piece of agriculture land without the need for AVTC'. However, during cross-examination, he agreed that he never inspected the house of the plaintiffs. In common with the other defendants' witnesses, he also blamed the plaintiffs for the water stagnation problem at the rear portion of Lot 700. He said that the proprietors of Lot 700 should 'earth-fill' the rear portion of Lot 700 accordingly and build perimeter drain surrounding Lot 700 for

water and waste to be discharged to the JKR common drain. He was also of the view that 'the proprietors of Lot 700 should have referred the issue of their water discharge on Lot 700 to the Superintendent of Land and Survey Department, Sri Aman for consideration and decision pursuant to Section 35 of the Sarawak Land Code'.

[29] The eighth witness for the defendants was Mr Lim Bih Wei (DW8), the enforcement officer of Land and Survey Department. He tendered exh D32, which is a letter that he issued, into evidence. In that letter, he asked the MDSA to investigate the building plan of the plaintiffs' house. However, he never visited Lot 700 or Taman Desa Indah.

[30] The ninth and last witness for the defendants was Mr Jack Aman Luat (DW9) from the District Office of Lubok Antu. At the material time, he was the Secretary of Majlis Daerah Seri Aman (MDSA). He said that he wrote to the plaintiffs requesting them to prepare and submit a building plan in respect of the house they had built on Lot 700. He said that no prior building plan had been submitted. He said that the drainage system of Lot 700 was not proper as a proper drainage system in Lot 700 would have ensured that all water and waste are discharged into the JKR common drain.

THE ISSUES

Trespass

[31] The plaintiffs' claim is founded on trespass and nuisance. Firstly, the plaintiffs led evidence to support their case that the defendants' retaining wall had encroached into Lot 700. Secondly, the plaintiffs led evidence that the bakau piles and concrete slabs were placed 1.1 metres inside their land along their common boundary.

[32] I shall firstly consider the allegation that the retaining wall erected by the defendants along Lot 99 had protruded to the plaintiffs' land. PW3 and PW4 who are surveyors called by the plaintiffs confirmed that the wall had protruded 29 millimetres into Lot 700 at two sections. The defendants' surveyors did not rebut this evidence. However, nothing much turns on the 29 millimetres protrusion of the retaining wall into Lot 700 as according to PW4 the allowable error in engineering practice is 70 millimetres. I also note that this point was not seriously pursued in the final submission of the counsel for plaintiffs. I, therefore, find that the protrusion of 29 millimetres of the retaining wall did not occasion trespass or nuisance.

Whether concretes slabs and bakau piles on the plaintiffs land?

[33] The more vigorously pursued argument of the plaintiffs is that the

bakau piling and the construction of the concrete slabs on their land amounted to trespass and continuing nuisance. PW1 testified that the bakau piling and concrete slab that ran along the boundary of Lot 700 and Lot 99 was 1.1 metres inside his land. It was meant as a foundation for the retaining wall. However, after PW1 complained that the land on which the slabs were placed was within his boundary notwithstanding the fact that the said area was just outside his chain link fence, the first defendant built the retaining wall further away inside Lot 99. The fact that the concrete slabs were inside the plaintiffs' land was confirmed by PW3 and PW4 who were qualified surveyors. The defendants did not directly challenge the expert evidence of PW3 and PW4 that the concrete slabs were within Lot 700. I have no reason to doubt the unchallenged survey findings of PW3 and PW4. I, therefore, find that the concrete slabs were placed inside Lot 700 by the first defendant.

Whether the plaintiffs at fault for constructing the chain link fence inside their boundary instead of on the boundary?

[34] The defendants raised the following issues to blame the plaintiffs for their mistake in placing the concrete slabs on the plaintiffs' land. Firstly, they argued that the location of the plaintiffs' chain link fence had led them to conclude that the chain link fence was the boundary. In other words, the defendants' argument is that a property owner should fence up his land in order to let others know the extent of his boundary. Counsel for the defendants also argued that the plaintiffs denied themselves access to the strip of land outside the fence by constructing their fence a few feet inside of their actual boundary. Thus they have not exercised their right to possession. Therefore, a claim in trespass cannot lie against the defendants. Counsel for the defendants quoted the English case of *J A Pye (Oxford) Ltd and another v Graham and another* [2002] 3 All ER 865. I see no merit at all in this point. The said case involved a dispute between a landowner and a squatter. The decision in that case is based on English land law and the principle of adverse possession. The same can be said in the case of *London Borough of Hounslow v Minchinton* (1997) 74 P & CR 221; [1997] NPC 44 which concerned the significance of a fence erected by the owner of the land. Under the torrens system or a modified Torrens system of land law, a squatter cannot get rights merely by physical possession of the land (see s 131 of the Land Code (Cap 81) and the case of *Yayasan Pelajaran Bahagian Pertama Sarawak v Lim Teck Hai & 8 Ors* [2008] MLJU 761; [2008] 1 LNS 637). Even if the argument is that the defendants are not claiming a right to the land but are merely setting up a defence to the trespass action on the ground that the plaintiffs did not exercise exclusive possession of the land, the defendants still have to contend with the continuing nuisance claim. The first defendant had constructed concrete slabs of 26 metres in length on the plaintiffs' land and had let them remain there up to the present time. Surely that is gross interference with the property rights of another. The defendants

also raised the point about acquiescence. In the case of *Ng Yee Fong & Anor v E W Talalla* [1986] 1 MLJ 25 Mohamed Azmi SCJ, described the equitable doctrine of acquiescence as follows:

> The term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of his right of which he did not know at the time, and in that sense acquiescence is an element in laches. The term is however properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act (see *De Bussche v Alt* (1878) 8 Ch D 286, 314).

[35] Counsel for the defendants also mentioned estoppel and waiver. They are related to the doctrine of acquiescence. The defendants' defence is based on the argument that the plaintiffs did not maintain proper boundary marks as stipulated in s 32(1)(b) of the Sarawak Land Code and did not complain immediately. Section 32(1)(b) reads as follows:

> 32(1) In the absence of any express provision to the contrary in the document of title to any land whether alienated before or after the 1st day of January, 1958, there shall, by virtue of this section, be implied in such document of title the following conditions, obligations and restrictions —
>
> (b) that all boundary marks by which the boundaries of the land are defined shall be duly maintained by the proprietor or occupier;

[36] However, the Sarawak Land Code does not enact that failure to maintain boundary marks would permit the invocation of the doctrine of adverse possession by squatters against the interest of registered owners. In my view, the provision merely absolve the state from the expense of maintaining boundary marks. The second argument is that the plaintiffs did not immediately complain. PW1 noticed the bakau piling around 26 June 2004. However, PW1 only lodged a police report on 12 July 2004. I do not see any element of acquiescence on the part of PW1 who told the court that he immediately complained to one Yong Ah Mui, who despite being a government servant, assisted the defendants in the Taman Desa Indah project. The defendants have urged the court that adverse inference should be drawn against plaintiffs for not calling Yong Ah Mui to the witness stand. In my view, there is no justification for doing that. Adverse inference should only be drawn if there is suppression of evidence. In the first place, there is absolutely no evidence that the plaintiffs are in a position to procure the attendance of the said Yong Ah Mui as a witness. In any event, it is ridiculous to hold that the first defendant could have been induced, mistaken or misled by the chain link

fence, the absence of boundary marks and the belated complaint about the construction of the concrete slabs. The first defendant is a big housing developer. It must be presumed that the first defendant had engineers and surveyors at their disposal to develop the project. The first defendant's first duty should have been to establish the exact boundary of the parcels of land that they intend to develop for profit. Instead, the first defendant has seen it fit to blame a neighboring landowner (the plaintiffs) for their own mistake in constructing concrete slabs on plaintiffs' land. I, therefore, hold that the first defendant cannot shift the blame to the plaintiffs for not surveying their own land for the purpose of demarcating its exact boundary.

[37] It was suggested by the witnesses of the defendants that the strip of land where they constructed the concrete slab was 'no-man's land'. However, the locality map of Lot 700 and Lot 99 does not show any gap. Therefore the suggestion that the said land is 'no-man's land' is without any foundation whatever. In all probability, it is a convenient afterthought of the defendants.

THE REMEDY

[38] I, therefore, find that the first defendant had committed trespass and nuisance to the plaintiffs by piling bakau wood and constructing the concrete slabs in question on the plaintiffs' land. The next question that arises is whether a mandatory injunction for their removal should be granted. The plaintiffs' expert witness on this subject was PW7, the professional engineer. His report was tendered as exh WKC 2. It must be recalled that the bakau piling and concrete slabs were originally intended as foundation for the retaining wall. Later the first defendant shifted the construction of the retaining wall about two metres away from Lot 99. Therefore, only a narrow strip of land of five to six feet separates the concrete slabs from the retaining wall. Meanwhile Lot 99 has been earth filled and raised by 1.5 metres. Beyond the retaining wall, the first defendant had constructed houses. PW7 said in his report that the concrete slabs can be removed without the use of heavy machinery. The defendants' engineer, DW6 said that the use of heavy machinery (high capacity excavator) will cause damage to the soil and the retaining wall and houses constructed on Lot 99. The method proposed by PW7 is the use of air compressor breaker to demolish the concrete slabs and then to remove the debris. DW6 also said that the vibrations from the air compressor would affect the retaining wall. PW7 was confident that the air compressor method is safe. However, he agreed during cross-examination that he was unable to show detailed calculations and analysis of the risk involved to the retaining wall. This is what he admitted during cross-examination:

> (Q:) Refer to Paragraph 2 of your Report. Objective 2 of your report reads 'to established the effect on the stability of the retaining structure during and after the removal work.' Then, in your Conclusion, you stated that 'From

the above findings and study, the construction types as discussed are found to be practical and safe for the removal work'. Now refer to paragraph 4 on study and findings. Can you show to the Court, what engineering calculations and detailed analysis of the risks involved was carried out by you to come to the conclusions that the constructions type proposed by you are practical and safe for the removal of the concrete slabs?

(A:) No.

[39] PW7 also did not carry out tests in respect of the strength of the soil and the likely effects of the use of the machinery in the removal of the concrete slabs. Interestingly, PW7 had stated in his report that the bakau piles would minimise soil movement during earth-filling works. In fact, he advised against their removal in his report. This was elicited during cross-examination whereby he also agreed that the concrete slabs would have the same effect:

(Q:) In the last sentence of your report (Exhibit P44), you stated that 'as for the bakau piles, we advise that there is no need to remove them because they will minimized the soil movement during earth filling. I put it to you that the presence of the concrete slabs will also further help to minimize the soil movement during earth filing. Agree?

(A:) Yes.

[40] At one part of the report, PW7 even stated that:

As the existing concrete base is about 0.5 m below the ground level, the demolition of the concrete base may affect the existing retaining wall. However, with proper site supervision and planned sequence of demolition and backfill, the effect on the retaining wall can be minimized.

[41] Although in the above passage, PW7 said that proper site supervision and planned sequence of demolition and backfill will minimise the effect on the retaining wall, the fact remains that the existing retaining wall could be endangered. The burden to adduce evidence to make permanent the interlocutory injunction in respect of the removal of the bakau piles and concrete slabs is on the plaintiffs. For all the above reasons, I am of the view that the plaintiffs have not convinced the court on a balance of probabilities that it is safe or practical to order the removal of the bakau piles and the concrete slabs. Furthermore, for reasons that will be given later, I am minded to order the defendants to bear the expense of earth filling the rear portion of Lot 700 as the only practical and possible solution to the drainage problem. In addition, as conceded by PW7 during cross-examination, the bakau piles and concrete slabs will minimise soil movement during the earth-filling works. In respect of future use of the narrow strip of land, DW6 convincingly testified that cantilever ground beams could be utilised to support construction columns

above. In the premises, I shall not grant an order to make permanent the interlocutory injunction to remove the piles and the concrete slabs. The plaintiffs have applied for general damages for trespass and nuisance in the alternative. However, learned counsel for the plaintiffs did not cite any precedent in respect of the quantum. He also did not suggest a suitable quantum. It is clear that the plaintiffs had been wronged as the first defendant, who is a developer, did not demarcate their exact boundary before undertaking a big project. The encroachment is only 1.1 metres along their common boundary. The plaintiffs also delayed in not seeking an immediate ex parte injunction when the works first started. However, the greater blame lies on the first defendant. The property rights of the plaintiffs must therefore be respected and vindicated. Having considered all the circumstances, I shall award the plaintiffs general damages in the sum of RM10,000 for the trespass and nuisance occasioned by the bakau piles and concrete slabs which were placed in their land.

Nuisance occasioned by water stagnation

[42] The plaintiffs' claim of nuisance is founded on the allegation that mud, silt and waste flowed from the Taman Desa Indah housing project to Lot 700 since the middle of 2004. It is not in dispute that the first defendant had earth filled Lot 99 and the adjoining Lot 698. It is also not in dispute that there is water stagnancy problem at the rear portion of Lot 700. The numerous photographs tendered in court supported this fact. PW1 testified unchallenged that before the construction of the Taman Desa Indah housing project, spring water from the rear portion of his land flowed out naturally towards Lot 99 which was then on lower ground. Quite obviously, the plaintiffs' water stagnancy problem started with the construction of the Taman Desa Indah project. The first issue in respect of the nuisance claim is whether water, mud, and waste had flowed to the plaintiffs land. PW1 testified that water from Lot 99 which is on higher ground after earth filling, flowed to his land and then flowed down to the temporary culvert at Lot 698 which is lower than Lot 99. The first defendant's case was that the temporary drain was sufficient to drain out all the water and waste from the Taman Desa Indah project. They also denied that the water, waste and mud flowed to Lot 700. Finally, the first defendant said that the plaintiffs are at fault for not providing proper drainage for Lot 700. I find that the water, waste and mud had flowed to the rear portion of Lot 700. PW1 testified that the water that accumulated in his rear portion of the land during heavy rain initially flowed to the earth drain on Lot 698. After a while, waste, mud and silt choked the opening of the temporary drain near peg 357. This prevented water from flowing out. DW1 said in his evidence that the earth drain starts at Lot 770 and ran through to Lot 698. He said that the platform level of Lot 700 near the earth drain at peg 357 was higher and therefore water from Lot 700 flowed into the drain. But as the photographs

showed that the drain had become flooded, it is reasonable to assume that there was flow of water, waste and mud to the plaintiffs' land. Lot 99 had been raised by about 1.5 metres and other areas of the defendants' land are generally higher than Lot 700. I have no reason not to accept the evidence of PW1 on this point. The photographs PW1 tendered, the evidence of PW3 and PW4 who saw the water ponding on Lot 700 support PW1's contention that water, waste and mud had flowed to his land. The central argument of the defendants on this issue is that they were not obliged to provide drainage for the plaintiffs' land. Counsel for the defendants argued that it was the duty of the plaintiffs to provide a proper drainage system to their entire land, including the rear portion because they have 'developed' their land. I shall now consider the issue whether the plaintiffs had 'developed' their land and were therefore obligated by law to provide an approved drainage system.

Whether Lot 700 had been developed?

[43] It is common ground that Lot 700 was conditioned for agricultural use only. However, the defendants contended that the plaintiffs had developed Lot 700 without any building plan or engineering plan and this omission is the source of the water ponding problem at the rear portion. PW1 admitted in his evidence that he had built a double storey house on the higher portion of the land. The defendants (DW1) also contended that PW1 operated a workshop on his land. The sum total of the arguments of the defendants is that the plaintiffs had breached the condition of use of the land and that this was the source of their problems. Counsel for plaintiffs and defendants referred the court to s 227 of the Sarawak Land Code which reads in part as follows:

> 'develop' or 'development' means to carry out any building, engineering, or other operations in, on, over or under any land, or the making of any material change in the use of any building or land:
>
> Provided that the following operations or uses of land shall not be deemed for the purposes of this Part to involve development of land:
>
> (a)–(d) …
>
> (e) the use of any land for the purposes of agriculture or forestry (including afforestation), and the use for any of those purposes of any building occupied together with the land so used; and

[44] Counsel for the defendants submitted that the above proviso can be availed by the plaintiffs only if any building on the land is used for the purpose of agriculture. Counsel for the defendants argued that the house was used for residence and not for purpose of agriculture. It follows that the land had been

'developed'. Therefore, the plaintiffs were obliged to obtain approval for a properly engineered permanent drainage system for the discharge of water and waste from Lot 700.

[45] I shall firstly consider the allegation that the plaintiffs operated a workshop on Lot 700. The only evidence tendered to support the allegation is the oral evidence of DW1–DW2. However, DW1–DW2 had not been to the alleged workshop. The defendants also did not tender any photographs or documentary evidence to support the existence of the workshop. For that reason, as submitted by counsel for the plaintiffs, the defendants failed to prove that there was a workshop.

[46] Secondly, insofar as the condition of title is concerned, my view is that s 227 must be read together with s 39A of the Sarawak Land Code which permits one dwelling house to be constructed on land conditioned for agriculture. The relevant part of the provision reads as follows:

> (b)(i) one dwelling house for the proprietor of the land or, where he is not resident thereon, his agricultural tenant;

[47] In the instant case, the plaintiffs testified that they conducted extensive agricultural activities on rear portion of the land. They also testified that they lived in the house. There is no evidence of any workshop on the land. There is also no evidence that the house was used for any other purpose other than as a dwelling house for the plaintiffs and their children. It should not also matter if the plaintiffs had built a shack as their living quarters or a double storey house. Section 39A does not specify the type of dwelling house. In the premises, I am of the view that the plaintiffs had not breached the condition of title of Lot 700 or had 'developed' the land within the meaning of the Sarawak Land Code. As the plaintiffs had not developed their land, the next issue that arises from the argument of the defendants is whether they should have submitted a building plan for their house. In fact, after the suit was instituted, the first defendant had complained to the authorities that the plaintiffs did not submit a building plan before constructing their house. The plaintiffs and their witnesses testified that a perimeter drain around the house had been constructed to drain water to the main drain at Long Round Road. It may well be that the plaintiffs had breached some provision of the Sarawak Land Code or local authority by-law in not obtaining prior building plan approval for their double storey concrete house. However, I agree with Justice Clement Skinner who granted the interlocutory injunction judgment that this argument has no merit. His Lordship said as follows:

> Further, even if it can be argued that the plaintiffs have breached some provisions of the Code that cannot possibly be a justification for the first defendant to cause flooding to the plaintiffs' land.

[48] I bear in mind that the defendants' argument is that the development to the land requires a drainage system. As explained earlier, the plaintiffs had provided a perimeter drain for their dwelling house. As for the remaining two thirds of the land on the lower ground, the plaintiffs have only undertaken agricultural activities. Counsel for the defendants submitted to the court that the construction of the three fish ponds had affected the natural flow of water as a huge amount of water would be discharged twice a year. PW1 told the court that he would drain the fish pond twice a year. However, the defendants completely failed to establish any nexus between the draining of the fish ponds and the water stagnancy problem of the plaintiffs. DW1 was not a witness to the draining of the fish ponds. PW1 testified unchallenged that the prior to the construction of the Taman Desa Indah housing project, he never experienced water ponding problem at the rear portion of his land. The defendants' parcels of land were on lower ground prior to the earth filling. The platform level of the rear portion of the plaintiffs' land was higher. Therefore, in all probability, as testified by PW1, surface run-off and spring water flowed naturally in undefined channels over the back portion of his land to the defendants' land before discharging at Sungei Undup.

Whether a higher land owner can send water down to lower land owner?

[49] The crucial issue that arises is whether the defendants could obstruct the natural flow of water from Lot 700 by raising the level of their land and building a retaining wall. The larger question of public interest on this point was framed by Justice Clement Skinner in the interlocutory injunction judgment as follows:

> Does the owner of higher land have a right to send down, and is there a corresponding obligation on the owner of lower land to receive natural water, whether flowing in a defined channel or not, as an incident of property arising from the relative levels of their respective lands?

[50] As stated by Justice Clement Skinner, there are two lines of authority. In *Medway Investments Pte Ltd v Trustees of the Estate of Cheong Eak Chong* [1997] 3 SLR 40, which was relied on by the plaintiffs, the Singapore Court of Appeal preferred the view expressed in the Privy Council case of *Gibbons v Lenfestey* (1915) 84 LJ PC 158. The case of *Gibbons v Lenfestey* originated from the Royal Court of Guernsey in the Channel Islands which applied the Civil law. The Privy Council said as follows:

> Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior.

[51] Although *Gibbons v Lenfestey* originated from a civil law jurisdiction, it has been accepted in some countries that apply the common law. It was followed in New Zealand in the case of *Bailey v Vile & Anor* [1930] NZLR 829 and in India in the case of *Sheik Hussain Sahib v Pachipulusu Subbayya* 1925 ILR 49 Mad 441. In *Medway Investments Pte Ltd v Trustees of the Estate of Cheong Eak Chong*, counsel for the appellant conceded that the owner of a higher land has the right to let surface water flow naturally on to or into adjacent lower land. However he contended that the owner of the lower land has no obligation to receive such water and is entitled to pen it back to the higher land. The Singapore Court of Appeal disagreed and preferred the view expressed in *Gibbons v Lenfestey*. The Singapore Court of Appeal also noted that right of the upper landowner to send water down to the lower owner is not absolute but subject to certain qualifications. The lower land owner is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means. The Singapore Court of Appeal said as follows:

> The limits cannot be defined by definition, but each case must depend on its own circumstances. It would not, for instance, be within his right to introduce water which was foreign to the land — eg by procuring a pipe-supply or draining another watershed — and then insist that all the water so brought on the land should be received by the inferior proprietor to his detriment.

[52] The Singapore Court of Appeal then quoted with approval the following passage from the Scottish case of *John Young & Co v Bankier Distillery Co* [1893] AC 691 where Lord Watson at the Court of Sessions said as follows:

> The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground is due to gravitation, unless it has been unduly and unreasonably increased by operations which are in *aemulationem vicini*. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; …

[53] Very much like the position taken by counsel for appellant in *Medway Investments Pte Ltd v Trustees of the Estate of Cheong Eak Chong*, counsel for the defendants in the instant case has argued that the Australian case of *Gartner v Kidman* (1962) 108 CLR 12 should be followed in preference to *Gibbons v Lenfestey*. In the former case, the Australian High Court held that the lower landowner may erect barriers to pen the water back. Windeyer J said as follows:

> Although he has no action against the higher proprietor because of the natural unconcentrated flow of water from his land, he is not bound to receive it. He may put up barriers and pen it back, notwithstanding that doing so damages the upper proprietor's land, at all events if he uses reasonable care and skill and does no more than is reasonably necessary to protect his enjoyment of his own land. But he must not act for the purpose of injuring his neighbour. It is not possible to define what is reasonable or unreasonable in the abstract. Each case depends upon its own circumstances.

[54] Counsel for the defendants submitted that our Federal Court in *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286; [1984] 1 CLJ 291 had followed the principles applied in the case of *Gartner v Kidman*. I have read the said judgment in *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd*. However, *Gartner v Kidman* was not cited in the said judgment. The right of the lower landowner to erect barriers and pen back the water from the upper neighbours is not discussed either in that judgment. The discussion in the Federal Court judgment focused on negligence and the Rule in *Rylands v Fletcher*. I shall respectfully follow the view expressed in the Singapore case of *Medway Investments Pte Ltd v Trustees of the Estate of Cheong Eak Chong*. I am of the opinion that it is erroneous to say that since *Gibbons v Lenfestey* emanated from a civil law jurisdiction, it should not be followed in common law countries. As pointed out by the Singapore Court of Appeal, it has been followed in a number of common law jurisdictions. The principle in *Gibbons v Lenfestey* does not give an absolute and unfettered right to the upper landowner to deal with his land to the detriment of the lower landowner. It is subject to qualifications according to the circumstances of the case. The underlying principle is that as long as the upper landowner did not disturb the natural flow of water by doing some development to his land that would have resulted in a high concentration of water or water flowing at a higher velocity, the lower landowner cannot complain. Conversely, that should also mean that if the lower landowner disturbs the natural flow of water by erecting a barrier such as a bund or retaining wall, he should provide sufficient drainage so as to avoid flooding in the upper neighbours' land. This was the principle considered in *Medway Investments Pte Ltd v Trustees of the Estate of Cheong Eak Chong*. The same principle was applied in the Indian case of *Sheik Hussain Sahib v Pachipulusu Subbayya* 1925 ILR 49 Mad 44. The lower landowner's decision to erect a bund on his land which had the effect of flooding the upper landowner's land was held to be wrongful. In the instant case, from the evidence, I have no reason to conclude that the plaintiffs had done something to their land so as to cause water to flow unnaturally to the defendants' land. It is true that the plaintiffs had built a house on the land. This house was built on the higher portion of the land. There is no evidence whatsoever that the construction of this house had caused water to flow unnaturally down to the defendants' land. The plaintiffs have provided a perimeter drain around the house to drain water to the main drain at Long

Round Road. As for the remaining two thirds of the lower part of the land, the plaintiffs only conducted agricultural activities. They had not disturbed the natural contour of the land by earth leveling or by building any concrete structures. They had dug the earth to construct three fish ponds which were drained only twice a year. However, there is no evidence that the draining of the fish ponds had caused the water stagnation problem. It is absolutely obvious that the earth leveling works, earth filling works and the construction of a retaining wall on the defendants' land had prevented the natural flow of water from the rear portion of the plaintiffs' land. It cannot be otherwise as the defendants' land was on lower ground than the rear portion of the plaintiffs' land before the Taman Desa Indah housing project started. In the premises, the first defendant should have provided adequate drainage from the outset. I am also of the opinion that a serious mistake could have occurred in the preparation of the defendants' first topographical plan that was prepared by one Lu Hieng Lee in 2002. In this plan, the points of Lot 99 which adjoins Lot 700 are shown at 12.5 metres when they are actually lower at 10.95–11.03 metres. The defendants explained that the contours of the land could have changed since then. Be that as it may, the first defendant, as a developer with surveyors and engineers at their disposal, should have foreseen that the surface run off and spring water would be trapped on the rear portion of the plaintiffs' land due to the increase in height of Lot 99. I, therefore, find the first defendant liable in nuisance for the water stagnancy problem of the plaintiffs.

Defence of statutory authority

[55] I have also considered the argument whether the first defendant is endowed with immunity merely because the local authority had approved their engineering plan. In the said engineering plan, the invert level of first defendant's permanent drain is higher than the rear portion of the plaintiffs' land. The first case submitted by counsel for defendants is *Allen v Gulf Oil Refining Ltd* [1981] 1 All ER 353. In that case, the defendant was authorised to build an oil refinery by an Act of Parliament, ie the Gulf Oil Refinery Act 1965. The plaintiff complained that it produced noise and vibrations. The House of Lords held that the Act gave implicit protection against actions in nuisance. Lord Wilberforce summarised the common law defence of statutory authority as follows:

> It is now well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance.
>
> …To this there is made the qualification, or condition, that the statutory powers are exercised without 'negligence', that word here being used in a special sense so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons …

[56] However, Lord Wilberforce has added a qualification that the statutory powers conferred by the Act must be done without negligence. In any case, the defence of statutory authority has no application here because the first defendant is not authorised by any Federal or State Law to carry out the Taman Desa Indah project. It was merely a commercial project which is subject to local authority approval. In the premises, the first defendant is not immune from tortious claims merely because the project has been approved by the relevant local authority. In any event, to avail the defence of statutory authority, the first defendant must successfully demonstrate that they were not negligent. In the instant case it is foreseeable that raising the level of their land and erecting a retaining wall would pen back water from Lot 700 which was formerly higher than their land.

[57] The second case cited by counsel for the defendants is *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd & Ors* [1992] 3 All ER 923 is more relevant. It concerns grant of planning permission. In that case, the defendant had been granted planning permission to use a dock as commercial port in a residential area. The plaintiff brought an action saying that the passage of heavy traffic in the area constituted public nuisance. Buckley J dismissed the action and said that a planning authority can alter the character of a neighbourhood. He said as follows:

> The point arises in this case. Prior to January 1984 Medway and Bridge roads had been relatively quiet residential roads. True, they led to the old Naval Dockyard but that did not generate many HGVs and probably none at night. For obvious reasons sites for naval bases were not chosen for their land communications. It seems to me that I must judge the present claim in nuisance by reference to the present character of the neighbourhood pursuant to the planning permission for use of the dockyard as a commercial port. Thus, these roads are now in the neighbourhood of and lead immediately to a commercial port which operates 24 hours per day. In those circumstances I hold that the undoubted disturbance to the residents is not actionable.

[58] However, in my opinion, the point that arises in this suit is not whether the change of character of the neigbourhood had affected the plaintiffs' quiet enjoyment of their property. It is whether nuisance had been occasioned by the development of the defendants' land. On this point, Buckley J clearly held that the grant of planning permission is not a licence to commit nuisance and that a planning authority has no jurisdiction to authorise nuisance. His Lordship said as follows:

> It has been said, no doubt correctly, that planning permission is not a licence to commit nuisance and that a planning authority has no jurisdiction to authorise nuisance. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood. That may have the effect of rendering innocent activities which, prior to the change, would have been an

A actionable nuisance (see *Allen v Gulf Oil Refining Ltd* [1979] 3 All ER 1008 at p 1020; [1980] QB 156 at pp 174–175 per Cumming-Bruce LJ, referred to in the speech of *Lord Wilberforce* ([1981] 1 All ER 353 at p 357; [1981] AC 1001 at pp 1013–1014)).

B **[59]** In the premises, the defence that the engineering plan had been approved by MDSA is no defence by itself if the plaintiffs can prove that the first defendant had been negligent in raising the level of their land without providing sufficient drainage for the natural flow of water from Lot 700.

C Whether the plaintiffs should have resorted to statutory remedies under s 35 of the Sarawak Land Code (Cap 81)?

[60] Section 35 of the Sarawak Land Code provides that all land shall be held D subject to an implied right of the proprietors or occupiers of neighbouring land to drainage and irrigation and that a dispute in regard to this matter may be referred to the superintendent for a decision. It also provides that any party aggrieved by the decision of the superintendent may appeal to the High Court. Counsel for the defendants submitted that the plaintiffs should have resorted E to this provision to seek redress. However, I see no merit in this point. Section 35 does not prevent landowners from exercising their common law rights. Furthermore, I completely agree with the observation of Justice Clement Skinner who said as follows when granting interlocutory judgment in this case:

F The plaintiffs are not here trying to enforce any of the statutory rights mentioned in s 35(4). There is no 'existing party drain' between the plaintiffs' land and that of the first defendant over which a dispute has arisen between the parties. Here the plaintiffs have come to court to enforce their common law rights of drainage as an incident of property arising between owners of adjoining lands because of the relative levels of their respective lands. Accordingly I find the arguments based on G s 35(4), (7) and (8) of the Code and the case relied on in support of it, irrelevant.

Whether the first defendant had offered to earth-fill the plaintiffs' land up to the same level or slightly higher than Lots 99 and Lots 698?

H **[61]** The evidence on this issue is conflicting. DW1 told the court that he had offered to raise the level of the back portion of Lot 700 but was rebuffed by PW1 who made a sarcastic remark that he preferred a swimming pool at the rear portion. PW1 denied that there was any such offer. I am inclined to accept I the evidence of PW1 on this point. He had suffered a serious water stagnation problem at the back portion because of a big housing development project. It is, therefore, unlikely that he would have scoffed at any suggestion to solve the problem. In any event, as PW1 said, raising the level of the back portion of Lot 700 alone would cause problem to his neighbour, the owner of Lot 703. DW1

also did not produce any letter evidencing a formal offer to the owners of Lot 700 and Lot 703 at the outset of the flooding. It is likely that the offers were made only at the mediation session initiated at the Court of Appeal hearing. In the premises, it is not fair to blame the plaintiffs for not accepting any offer to raise the level of the back portion of Lot 700.

THE REMEDIES

[62] In conclusion, I have found on a balance of probabilities that the plaintiffs have proved trespass and nuisance against the first defendant who is the developer of the Taman Desa Indah project. In respect of trespass occasioned by the presence of bakau and concrete slabs on the land of the plaintiffs, for reasons given earlier, I have awarded RM10,000. In respect of the injunctive relief for nuisance, the plaintiffs prayed for an order that the first defendant provide a permanent water outlet for the purpose of discharging water from the plaintiffs' land. In the course of the trial, it has become clear that this remedy is not feasible. The first reason would be that the invert level of the JKR main drain is higher than the back portion of Lot 700. Therefore even if the invert level of the Taman Desa Indah concrete drain is lowered, water would not flow to the JKR main drain. The second reason is that the first defendant has nothing to do with the Taman Desa Indah concrete drain anymore as it has been surrendered to the MDSA as per the conditions of planning approval for the project. In short, it is now a public drain managed by a local authority. Therefore, it would be impossible for the first defendant to carry out any engineering works to comply with the order of court to lower the level of this drain to drain water from the back portion of Lot 700. Furthermore, MDSA is not party to this suit. The only practical remedy is found in the alternative prayer of the plaintiffs which is compensation for the plaintiffs to raise the level of the back portion of Lot 700. PW1 had said that he could obtain permission from owner of Lot 703 to do so. The other injunctive orders are not appropriate at this point of time as they have been overtaken by events. However, in my view, they were necessary at the time the plaintiffs made the interlocutory injunction application. The back portion of Lot 700 had become flooded through no fault of the plaintiffs and it was necessary to drain the water out. For that reason, I shall not make any award of damages against the plaintiffs on account of having obtained those injunctive orders.

THE QUANTUM OF DAMAGES

[63] The plaintiffs have claimed RM85,412.60 as the costs of earth-filling and raising the level of the back portion of Lot 700 so that water can be drained to the concrete drain of Taman Desa Indah. PW9, who is an earthworks and road construction contractor issued a quotation in the sum of RM74,174 (exh P53) to the plaintiffs for earth filling and raising the back portion of Lot 700.

He is a contractor with 20 years experience. He based his estimate on the calculation of PW4, the surveyor from survey solutions. He said that at the time the quotation was issued, ie on 31 January 2010, one cubic metre of earth cost RM16. However, one cubic metre now costs RM19. He therefore revised his quotation to RM85,412.60. During cross-examination, counsel for defendants suggested that it would costs less than RM30,000 to earth fill the back portion of Lot 700. However, the defendants did not produce any quotation from contractors that is lower than the quotation of PW9. However, DW2 who is a director of the first defendant himself estimated the cost of earth-filling the back portion of Lot 700 at RM30,000. In my view, the evidence of PW9 is preferable as he is a contractor in the Sri Aman area with 20 years experience in performing earthworks and road construction. The fact that PW9 did not personally calculate the volume of earth required is not relevant as he is able to rely on the calculation of the surveyor. DW2 said that the distance between the worksite and the source of the earth is an important factor as transportation costs are high. He said that the costs would be lower if the plaintiffs could source for earth from a nearby location instead of relying on PW9 who intends to transport earth from a relative's land that is six kilometres away. However, apart from criticising the quotation of the plaintiffs, the defendants failed to produce a cheaper quotation to prove their point. It must be noted that DW2 is neither a quantity surveyor nor a contractor in the business of supplying earth. I shall, therefore, accept the revised quotation of PW9 and award damages of RM85,412.60 in lieu of an injunctive order that the defendants provide a permanent water outlet for the purpose of discharging water from the plaintiffs' land.

[64] PW9 also gave an quotation for the construction of three fish ponds at RM4,800 per fish pond, a quotation for the reconstruction of the chain link fence which was damaged during the flooding at RM8,001 and quotation of RM850 for the reconstruction of the zinc shed. DW2 told the court that the estimated costs of constructing the chain link fence is only RM3,279.50. He said that a fish pond of the dimensions quoted by PW9 would cost only RM945. The defendants did not attempt to procure any quotation from independent contractors to support their low estimates. As I have stated earlier, DW2 is neither a quantity surveyor nor a contractor in the business of performing the above works. He may have some experience working for developers but he is clearly an interested party and his low estimates ought to have been corroborated by independent contractor's estimates. I shall, therefore, accept the evidence of PW9 and award damages of RM85,412.60 for earth-filling the back portion of Lot 700, RM8,001 as costs for the construction of the said chain link fence, RM14,400 for the damaged fish ponds and RM850 for the construction of the zinc shed.

[65] For the loss of income from fruit trees and flower plants, the plaintiffs

claimed RM107,950 as per particulars of damage. I see no reason not to accept the evidence of PW1 that he lost income as stated in his witness statement. In respect of the loss of income from the three fish ponds, PW1 said that he lost RM23,820 a year. For a period of eight years, he is now claiming damages of RM190,560. He is also claiming RM150 for loss of a belian tree. PW1 has given detailed calculations of loss income which, in my opinion, appear reasonable. He was not convincingly challenged during cross-examination on his loss and the defendants did not produce any other estimate of loss to dispute the calculation of PW1. It is also common ground that the land was conditioned for agriculture and that the plaintiffs have been carrying out agricultural activities at the back portion of Lot 700. I shall, therefore, award RM107,950 as damages for loss of income from fruit trees and flower plants, RM190,560 for loss of income from harvest of fish and RM150 for the damaged *belian* tree.

[66] In view of the protracted dispute, the plaintiffs engaged PW3 from survey solutions four times to do boundary survey, topographical survey, survey of retaining wall, additional survey for volume calculation of the back portion of Lot 700. The plaintiffs paid RM11,668.65 to survey solutions for their professional work. The expense which is receipted, in my opinion, is entirely reasonable. I shall, therefore, allow it as prayed. I shall also allow agreed special damages of RM5,336.52 for fuel, parking fees, food, worker salaries and miscellaneous expenses.

THE COUNTERCLAIM

[67] The defendants have counterclaimed against the plaintiffs, primarily for alleged delay in the project due to the flooding caused by the lack of drainage on the plaintiffs' land. The defendants have claimed special damages of RM1,106,454.20 (for construction of additional roads, drain, retaining wall, increased costs of construction, loss of profit occasioned by delay) and an indemnity sum of RM376,500 for draining water with a motor pump from Lot 700 as per the interlocutory injunction granted by the court. The defendants also argued that it was the duty of the plaintiffs to provide retaining wall. Furthermore, as the plaintiffs allegedly refused to increase the level of the back portion of Lot 700, the defendants were put to the expense of constructing a temporary drain. Finally, the defendants submitted, that the interlocutory injunctions were wrongly obtained by the plaintiffs. As a result, the defendants had to incur expenses in continuously pumping water out of the back portion of Lot 700.

[68] I shall dismiss the counterclaim for the following reason. I have stated earlier that there is no duty on the part of the plaintiffs to provide for drainage as water from Lot 700 naturally flowed to the defendants' land prior to the

execution of the Taman Desa Indah project. All other arguments on which the counterclaim is hinged, including the argument that plaintiffs should have constructed the retaining wall, is related to this alleged duty to provide drainage. For the same reason, I also held earlier that the interlocutory injunctions were not wrongly obtained. In the premises, the counterclaim of the defendants is dismissed.

CONCLUSION

[69] In conclusion, the claim of the plaintiffs is allowed with an award of damages as follows:

(a) RM10,000 for trespassing and nuisance;

(b) RM85,412.60 as costs for earth filling in lieu of an injunctive order that the defendants provide permanent water outlet for the purpose of discharging water from plaintiffs' land;

(c) RM8,001 for construction of chain link fence;

(d) RM14,000 for costs of constructing three fish ponds;

(e) RM850 for construction of zinc shed;

(f) RM107,950 as damages for loss of income from fruit trees and flowers;

(g) RM190,560 as damages from loss of income from harvest of fish;

(h) RM150 for damage of *belian* tree;

(i) RM11,668.65 as costs for survey work by survey solutions; and

(j) RM5,336.56 as special damages.

[70] I shall award with costs of RM60,000 in favour of the plaintiffs.

Claim allowed and counterclaim dismissed with costs.

Reported by Ashok Kumar